



**OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN**

**GERALD C. MANN
ATTORNEY GENERAL**

**Honorable Lee Brady
Banking Commissioner
Austin, Texas**

Dear Sir:

**Opinion No. O-5858
Re: Disposition of Social Security
deductions from salaries of
employees.**

Your request for an opinion relative to the proper disposition of funds withheld by you from employees' salaries is such that we deem it important to here set out your letter in full. It is:

"The controversy existing between the Federal Government and the Banking Commissioner as Statutory Liquidator of the several insolvent banks and building and loan associations, relative to the liability of corporations for Social Security taxes, is now being compromised, the Commissioner having been authorized to effect such compromise on behalf of each liquidation by order of the District Court having jurisdiction over each liquidation. These orders are all identical in form, a copy of the form used being hereto attached.

"As a basis of compromise, the Federal Government has agreed: (1) to waive all penalties and interest; (2) to abate any tax which accrued prior to May 28, 1938, where the collection of the tax would interfere with the full payment of depositors and creditors, and (3) to accept \$2.00 as full satisfaction of any liability asserted against these liquidations in which all assets had been disposed of prior to the assessment of the tax. The compromise amounts

computed on this basis aggregate approximately one-third of the liability asserted by the Federal Government.

"In effecting this compromise, this Department has not admitted liability, but instead has uniformly denied liability and refused to pay the tax assessed. The Department's motive in effecting this compromise is not fear of liability, but realization that the depositors and creditors of the several insolvent corporations would suffer more from the prolonged litigation necessary to legally determine liability - irrespective of the outcome of that litigation - than they would by paying the compromise amounts at this time.

"The Federal Government, on the other hand, by accepting approximately one-third of the amount which would be due if liability had been established, has clearly indicated that it does not consider the existence of liability free from doubt.

"You are, of course, aware that this Department has consistently denied liability and refused to pay these taxes, following the ruling of your Department under Opinion No. 3049. In spite of the fact that we consistently denied liability, we, nevertheless, as a matter of precaution, deducted 1% from the salaries of employees, and now hold this fund amounting to several hundred dollars in trust for the purpose of paying the employee's 1% of this tax liability, when and if such liability is established. Obviously, if in fact liability did not exist, we had no right to retain this 1%, and had there been a final adjudication denying liability, we would have been bound to pay this trust fund to the employees from whom it was retained.

"Having compromised the controversy, and precluded any possibility of ever having a final

adjudication of liability, we are now in doubt as to the proper disposition of this trust fund. Certainly the compromise cannot be considered as a determination that liability exists. Neither the Commissioner nor the several District Courts could, through a compromise agreement, make a determination of liability binding upon these several employees, so that their trust funds could be used in paying the compromise amount. It is interesting, too, to note that the several courts made no attempt to direct payment or partial payment of the compromise amounts out of these trust funds. The order authorizes the Commissioner to effect the compromise, and payment of the compromise amount out of the asset of the liquidation.

"In the light of these facts, I respectfully submit the following question:

"Should these trust funds be paid to the Federal Government as a part of the compromise amount, or paid to the employees from whose salaries they were withheld?"

Your reference to our opinion No. 3049 is a reference to opinion No. 0-575 (conference opinion 3049). In such opinion, we held that you were not liable for the Social Security taxes assessed under the Federal Social Security Act on employees hired by you to assist in the liquidation of defunct banks. It follows, assuming such opinion to be correct, that you had no authority to deduct one per cent from the salaries of those employees. Having made such deduction out of precaution as a protection against possible adjudication of liability, such funds constitute a trust fund in your hands for the benefit of the employees who contributed to such funds.

You advise that the form of order entered by the various district courts having supervision of the several banks in liquidation directs payment of the several amounts aggregating the total compromise amounts out of the assets of the banks in liquidation. Such being true, and the possible

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liability of the employees in question having been eliminated by the compromise, there is no need for the continuation of the trust and such sums as are now held by you should be returned to the respective employees out of whose salaries the same were deducted.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Lloyd Armstrong*

Lloyd Armstrong
Assistant

LL:CC

APPROVED AUG 21, 1941

George Mann

ATTORNEY GENERAL OF TEXAS

